HASSAN DATOLAH

v.

KERAJAAN MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
RAHMAH HUSSAIN J
[SUIT NO: S4-21-49-1995]
14 JANUARY 2003

TORT: *Negligence - Medical negligence - Whether proved - Degree of skill and care - Whether properly exercised - Link of causation - Whether substantiated - Whether operation done in accordance with accepted medical practice*

The plaintiff underwent an operation due to tremendous pain at the back of his body. Subsequently, the doctor (DW1) did a second operation to remove more bones, whilst the first operation was only to relieve compression. The plaintiff claimed his health had deteriorated after the second surgery and that there was negligence on the part of the defendant. The plaintiff's witness, PW3, who had examined him after the two surgeries, testified that the proper operation should have been by way of a "laminectomy", a wider compression, instead of "fenestation", a narrow operation to relieve compression. PW3 submitted that if "laminectomy" had been done in the first operation, there was no necessity for the plaintiff to undergo the second operation.

The issues to be determined were: (1) whether DW1 had exercised the degree of skill and care in opting to do the operation; and (2) whether the operation was done properly and appropriately according to the accepted medical practice.

Held:

[1] The activities engaged by the plaintiff prior to his admission to the hospital and the delay in seeking medical treatment had aggravated his injury. Even PW3 in his testimony was unsure whether or not the surgery had caused the paralysis. The contention that the plaintiff's state of health had only deteriorated after the second operation could not hold water. Thus, the plaintiff had failed to show the causative link between the resultant damage or injury and the act of the doctor. (p 359 c-g)

[2] The medical examination conducted by PW3 on 3 May 1993 was almost a year after the second operation which took place on 26 May 1992. Therefore, anything could have happened between these two periods that might aggravate the injury or interrupt the healing process. Further, the treatment given or examination done by PW3 on the plaintiff was not done

immediately to precisely ascertain any faults that might have occurred during the two surgeries conducted by DW1. Thus, DW1 had acted properly and adequately according to competent medical practice. (p 360 e-g)

[3] DW1 had adequately obtained written consent from the plaintiff. Furthermore, the plaintiff had ample opportunity to pose any questions to DW1 to clear any doubts that he might have concerning the surgery. Nevertheless, this was not done. DW1 had properly exercised the requisite degree of skill and care as required of him by law. (p 361 a-f)

[Plaintiff's case dismissed.]

Case(s) referred to:
Bolam v. Friern Hospital Management Committee [1957] 2 All ER 118
Hotson v. East Berkshire Areas Health Authority [1987] 2 All ER 909
Sidaway v. Bethlew Royal Governers & Ors [1985] All ER 643

For the appellant - Kartar Singh; M/s Bachan & Kartar
For the respondent - Abdullah Hassan FC

[The appellant has filed an appeal vide Civil Appeal No: W-01-27-02]

Reported by Suhainah Wahiduddin

JUDGMENT

Rahmah Hussain J:
The plaintiff's claims against the defendant are as follows:

(1) General damages.

(2) Special damages.

(3) Interest on general damages at 8% per annum from the date of service of summons to the date of judgment or realisation.

(4) Interest on special damages at 4% per annum from 8 May 1992 to the date of judgment and 8% per annum from the date of judgment to the date of realisation.

(5) Costs of this action.

(6) Further or other relief as this Honourable Court may deem fit and proper.

The brief facts of this case are:

On the night of 30 April 1992 at about 8pm, while returning from the "surau" (place of worship), the plaintiff missed a step. He did not fall but felt a slight

pain at the back of his body. He did not seek any medical treatment that night. The following day was a public holiday being "labour day". He continued with his daily routine that is, by going to the surau and participating in the gotong-royong. Finally, on 2 May 1992, he went back to work. Then on 4 May, when the pain at his back became unbearable he went to Fauziah Clinic to seek medical treatment. There was no improvement in his condition, so he went to Sentosa Clinic to seek a second opinion. He was advised by the doctor there to seek further medical treatment from the General Hospital. He went to the General Hospital immediately, and reached there around midnight. At this time the pain had increased tremendously, so much so that he had difficulty in passing urine, as well. He was admitted straight away but was only attended to by a doctor the following day between 9am and 10am. On that particular day he was examined by Dr Yeow (SD1 or DW1). After an X-ray was taken, Dr Yeow informed the plaintiff that he needed to undergo an operation. The doctor also assured him of recovery after the operation. Otherwise he would be paralysed. So, plaintiff consented to the operation, which was done on 7 May 1992. Subsequently the doctor did a second operation on the plaintiff. According to DW1 the purpose of the second operation was to remove more bones, whilst in the first operation, it was only to relieve the compression at the L3/L4.

During the course of this trial the plaintiff called two witnesses to prove his case. The first witness was PW2 – (Azizah Binti Mohd Zain) that is, the plaintiff's wife. The second witness was PW3 – Dr Tassim Rajan Mahamooth, who is a Consultant Orthopaedic Surgeon at Tawakal Hospital.

The defendant on the other hand called five witnesses, namely Dr Yeow Chai (DW1), the surgeon tho had conducted the operation on the plaintiff; Dr Muhd Borhan Tan Abdullah (DW2), an Orthopaedic Surgeon who was at the material time, the Head of Orthopaedic Services & Thermology Unit attached to the Kuala Lumpur General Hospital; Dr Shong Hing Kok (DW3) who was a Consultant Orthopaedic attached to Hospital Seremban; Mohamad Nor Bin Ismail (DW4) who was the Assistant Senior Record Officer for the Kuala Lumpur General Hospital and lastly, Dr Sahabudin Bin Raja Mohamed (DW5) who was a Consultant Urologist attached to the Kuala Lumpur General Hospital.

In order to prove negligence on the part of the defendant and/or its servant or agent, the plaintiff had called, as his main witness PW3, Dr Tassim Rajan Mahamooth who testified that when he saw the plaintiff on 3 May 1993, the former was a paraplegic with severe agonising pains down both calves. He said the plaintiff was numb from below the knees with no voluntary movement at

the ankle. He added, plaintiff's power at the hips was grade 4/5; at the knees, grade 3/4, while at ankle, 0. In other words, he said the plaintiff had sensory loss from the buttocks downwards with complete loss of power at the ankle. (See exh. P1 at pp. 137-139 bundle B).

PW3 testified further that, after carrying out tests on the plaintiff, he found that there was obstruction at the lumber region at L3/L4 and that there was a prolapse at L3/4 and L4/L5. Thus from the entirety of his evidence, PW3 formed the opinion that the first operation done on 7 May 1992 at the General Hospital was fenestration with dissectomy at L3/L4 and the second operation on 26 May 1992 was laminectomy with the removal of part of the lamina. Thus, he was also of the opinion that the proper operation should have been by way of "laminectomy", that is a wider decompression, instead of "fenestration" which is only a narrow operation to relieve compression. Furthermore, he said if laminectomy had been done in the first operation, there was no necessity for the plaintiff to undergo the second operation.

As against PW3's evidence, the defendant called three doctors to testify on its behalf. The first was DW1, that is the doctor who carried out the two operations on the plaintiff. DW1 confirmed that on 7 May 1992, he did fenestration and removal of discs at L3/L4 by removing the covering at the back. He also confirmed that after the operation, plaintiff neurologically deteriorated and his conditions worsened, that is the knee jerk was absent and power of ankle also decreased. So he carried out a second operation. He said before that he had explained to the plaintiff, the risk of this operation (laminectomy), and that the plaintiff had given his consent. According to DW1 this operation involved a wide exposure and decompression was done at two levels unlike the first operation which only received compression at L3/L4. Finally this witness agreed that if laminectomy had been done at L3/L4 instead of fenestration, there was no necessity for the second operation. However, he disagreed that both the operations had caused the paralysis.

Thus from the evidence led by both parties, I was satisfied that the injury sustained by the plaintiff was a serious one which required immediate medical attention. The diagnosis carried out before the first operation was done and it confirmed that the plaintiff had Cauda Equina Compression Syndrome or lesion. In fact, the plaintiff's main witness PW3, also agreed that there was Cauda Equina Compression and that if it was not operated on the plaintiff would have been paralysed. PW3 also testified that the myelogram indicated that PW1's injury was not a minor injury.

As to the plaintiff's delay in presenting himself for medical treatment, DW2 had this to say:

I cannot attribute his current condition to surgeon error in the management he received at Hospital Kuala Lumpur. I am of the opinion that his current condition is the result of the pathology of Cauda Equina Compression which was presented late for treatment. (emphasis added).

DW3 also confirmed DW2's evidence, when he said:

According to the teaching, the Cauda Equina Compression is worthwhile to operate early. In this case the operation on 7th May 1992 was done 6 days after the fall. This is considered to be a delay. The implication is that whatever damage has been done has been done. (emphasis added).

At this juncture, I am convinced that the activities engaged by the plaintiff prior to his admission to the hospital and the delay in seeking medical treatment had aggravated his injury. In fact, even PW3 in his testimony was unsure whether or not the surgery caused the paralysis. As such, I am of the view that the plaintiff has failed to show to this court the causative link between the resultant damage or injury and the act of the doctor. In *Hotson v. East Berkshire Areas Health Authority* [1987] 2 All ER 909, the House of Lords decided:

Held – The crucial question of fact which the judge had had to determine was whether the cause of the plaintiff's injury was his fall or the health authority's negligence in making an incorrect diagnosis and delaying treatment, since if the fall had caused the injury the negligence of the authority was irrelevant in regard to the plaintiff's disability. That question was to be decided on a balance of probabilities. Accordingly since the judge has held that on the balance of probabilities, given the plaintiff's condition when he first arrived at the hospital, even correct diagnosis and treatment would not have prevented the disability from occurring it followed that the plaintiff had failed on the issue of causation and the issue of quantification considered by the judge therefore never arose, because questions concerning the loss of a chance could not arise where there had been a positive finding that before the duty arose the damage complained of had already been sustained or had become inevitable.

Therefore, it is my considered opinion that the contention of learned counsel for the injury was not serious and that the plaintiff's state of health had only deteriorated after the operation, cannot hold water.

The next issue to be determined is whether DW1 as the doctor who performed the first operation had exercised the degree of skill and care in opting to do the operation. According to DW1, after an X-ray was taken he formed the opinion that the plaintiff had suffered a prolapse with Cauda Equina Compression. To confirm this he did a myelogram. After examining the result of the myelogram he believed that the patient needed an urgent operation to

explore at Level L3/L4 only. This first operation was then carried out. After the operation was completed, the plaintiff neurologically deteriorated and his condition worsened. DW1 then decided that a second operation was needed. So, he carried out a procedure which was more or less the same as the first operation except that there was more exposure in this operation. He said during the first operation his aim was only to relief L3 and L4. However, he said the second operation was necessary, as the first operation did not achieve the desired result. The purpose of the second operation was to remove more bones.

To my mind, the main consideration now is whether the operation was done properly and appropriately according to the accepted medical practice. Both DW2 and DW3 in their testimonies had confirmed that the surgeries performed by DW1 was proper and accepted among them as surgeons. Moreover, both these witnesses strongly suggested that the two surgeries performed by DW1 did not cause the paralysis hence there was no negligence on the part of DW1. Furthermore, the plaintiff's own witness, (PW3) also indicated that it was difficult to say whether the surgery did actually cause the paralysis. Thus from the evidence adduced by both parties, I feel that I can only come to one conclusion that is that the evidence led by the plaintiff to support his claim has not been consistent and solid. In fact, the medical examination conducted by PW3 on 3 May 1993 was almost a year after the second operation which took place at the general hospital on 26 May 1992. Therefore, to my mind, anything could have happened between these two periods that might aggravate the injury or interrupt the healing process. Finally, the treatment given or examination done by PW3 on the plaintiff was not done immediately to precisely ascertain any faults that might have occurred during the two surgeries conducted by DW1.

Thus, I am satisfied that DW1 had acted properly and adequately according to competent medical practice. In the landmark case of *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 118, Mc Nair J in his judgment at p. 128, (paras A-C) had stressed this at great lengths as follows:

> The question about which you have to make up your minds is whether Dr Allfrey, in following that practice, is doing something which no competent medical practitioner using due care would do, or whether, on the other hand, he is acting in accordance with a perfectly recognised school of thought. Dr Marshall at Netherne Hospital adopts the same practice. Dr Baker at Banstead Hospital adopts the same practice. It is true and in fact interesting as showing the diversity of practice, that Dr Page at the Three Counties Hospital, adopts a modification of that practice, inasmuch as he prefers to carry out the treatment in bed, with the patient controlled to some extent by the blanket, sheets and counterpane. That may be of interest to you as showing the diversity of practice; but it would not be right to take that as a condemnation of the practice adopted by the defendants.

On the issue of whether DW1 had properly administered caution and properly explained to the plaintiff the risk of the surgery, I feel that DW1 had adequately obtained written consent from the plaintiff. The plaintiff too had never, at any time during the proceeding, brought forth any solid evidence to show that this was not done. Furthermore, the plaintiff had ample opportunity to pose any questions to DW1 to clear any doubts that he might have concerning the surgery he was to undergo. Nevertheless, this was not done. Regarding patient obligation to ask, Lord Templeman in the case of *Sidaway v. Bethlew Royal Governers & Ors* [1985] All ER 643, at p. 664 (paras j) to p. 665 (paras a-b) had this to say:

> In my opinion, if a patient knows that a major operation may entail serious consequences, the patient cannot complain of lack of information unless the patient asks in vain for more information or unless there is some danger which by its nature or magnitude or for some other reason requires to be separately taken into account by the patient in order to reach a balanced judgment in deciding whether or not to submit to the operation. To make Mr Falconer liable for damages for negligence, in not expressly drawing Mrs Sidaway's attention to the risk of damage to the spinal cord and its consequences, Mrs Sidaway must show, and fails to show, that Mr Falconer was not entitled to assume, in the absence of questions from Mrs Sidaway, that his explanation of the nature of the operation was sufficient to alert Mrs Sidaway to the general danger of unavoidable and serious damage inherent in the operation but sufficiently remote to justify the operation. There is no reason to think that Mr Falconer was aware that, as Mrs Sidaway deposed, a specific warning and assessment of the risk of spinal cord damage would have influenced Mrs Sidaway to decline the operation although the general explanation which she was given resulted in her consenting to the operation.

Thus from the totality of the evidence before me and applying the *Bolam*'s test, it is my considered opinion that Dr Yeow (DW1) had exercised the requisite degree of skill and care as required of him by law. As such I am satisfied that the plaintiff has not proven his case. Therefore it is dismissed with costs.